STATE OF MICHIGAN
IN THE SUPREME COURT

LACY HARTER and MIKE McCLELLAND,
As Co-Personal Representatives of the Estate of KEGAN McCLELLAND, Deceased, and LACY HARTER, Individually and MIKE McCLELLAND, Individually,
Plaintiffs-Appellees,

-vs-

GRAND AERIE FRATERNAL ORDER OF EAGLES,
Defendants-Appellants,

MICHIGAN STATE AERIE FRATERNAL ORDER OF EAGLES, HOWELL AERIE #3607 FRATERNAL ORDER OF EAGLES, HARRIS SEPTIC TANK CLEANING & ALWAYS CLEAN PORTABLE TOILET, INC., DALE HARRIS, Individually and AMERICAN CONCRETE PRODUCTS, INC., Individually, and Jointly and Severally,
Defendants.
/

Supreme Court No. 126255
COA Docket No. 244689
44th Cir. Ct. No. 00-17892-NO

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/

PLAINTIFFS-APPELLEES' SUPPLEMENTAL BRIEF IN OPPOSITION TO LEAVE/OTHER PEREMPTORY ACTION

EXHIBITS

PROOF OF SERVICE

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COUNTERSTATEMENT OF THE ISSUES

I. DID JUDGE BURRESS PROPERLY DEFAULT THE GRAND AERIE "FOR ITS OWN EGREGIOUS BEHAVIOR?"

Plaintiffs-Appellees say, "Yes."

The Trial Court said, "Yes."

The Court of Appeals said, "Yes."

Defendant-Appellant says, "No."

II. DID THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY HOLD THAT THE GRAND AERIE COULD NOT RE-LITIGATE LIABILITY AFTER THE ISSUE WAS SETTLED BY THE PROPERLY ENTERED DEFAULT?

Plaintiffs-Appellees say, "Yes."

The Trial Court said, "Yes."

The Court of Appeals said, "Yes."

Defendant-Appellant says, "No."

III. ASSUMING ARGUENDO THAT THE SUMMARY DISPOSITION DENIAL IS REVIEWABLE, DID JUDGE BURRESS CORRECTLY RECOGNIZE THAT THERE WERE "MATERIAL QUESTIONS OF FACT TO BE DECIDED BY THE TRIER OF FACT?"

Plaintiffs-Appellees say, "Yes."

The Trial Court said, "Yes."

The Court of Appeals did not answer this question.

Defendant-Appellant says, "No."

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INTRODUCTION

On December 27, 2004, this Court, pursuant to MCR 7.302(G)(1) directed the Clerk to schedule oral argument on whether to grant the Application or take other peremptory action and permitted the parties to file supplemental briefs within 28 days (Exhibit 42). For the reasons set forth in Plaintiffs' June 25, 2004 Response and in this Supplemental Brief, the Court should conclude that the Livingston Circuit Court Verdict and Judgment will stand and deny the Application.

ARGUMENT

I. AS THE COURT OF APPEALS FOUND, JUDGE BURRESS PROPERLY ENTERED THE LIABILITY DEFAULT AGAINST THE GRAND AERIE "FOR ITS OWN EGREGIOUS BEHAVIOR."

Defendant disingenuously suggests that Judge Burress entered a default judgment when, in fact, the default was as to liability only and the Grand Aerie vigorously disputed damages at trial. The Grand Aerie and Amicus Michigan Defense Trial Counsel [MDTC] also falsely assert that Judge Burress failed to even consider lesser penalties before entering the liability default. At pages 8-9 of Plaintiffs' June 25, 2004 Response, we set forth Judge Burress' November 6, 2001 colloquy with trial defense counsel John Cothorn begging Mr. Cothorn to propose an appropriate sanction less than default. Nonetheless, Mr. Cothorn remained speechless. As set forth at page 10 of Plaintiffs' brief, on November 7, 2001, Judge Burress ordered the default because the Grand Aerie never answered the coverage interrogatories and stalled in ever sending an agent with settlement authority to the final settlement conference. Judge Burress neither erred at law nor abused his discretion in this ruling.

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MDTC carefully omits any discussion or even acknowledgment of this Court's recent default decisions in *Alken-Ziegler v. Walerbury Headers Corp., 461 Mich. 219 (1999)*; *Zaiter v. Riverfront Complex, Ltd., 463 Mich. 544 (2001)* and *Amco Builders & Developers, Inc. v. Team Ace Joint Venture, 469 Mich. 90 (2003)*. All of the cases MDTC discusses are from the Court of Appeals, and all pre-date the *Alken-Ziegler* decision. MDTC's amicus brief lists the following phrases as the appellate courts' description of the discovery violations in representative cases where default was affirmed on appeal: "protracted", "willful", "deliberate noncompliance", "history of recalcitrance", "absolutely no cooperation", "flagrant and wanton refusal to facilitate discovery", and "flagrant disobedience of the court's orders." Every one of these phrases would apply equally to the case at bar.

The Grand Aerie cites cases discussed by the Court of Appeals and by Plaintiffs in their earlier Response for a proposition that Plaintiffs do not contest. To be sure, default is not appropriate if an insurer meets and refuses to settle, but the insurer must not refuse to even meet. As Longhofer, Michigan Court Rules Practice (5th Ed.), §2401.13, p. 488 makes clear, the purpose behind MCR 2.401(F) "is satisfied when the insurance company sends a representative who has unlimited authority to settle the case and who is able to participate in meaningful settlement negotiations." That never happened here. In this case, after Judge Burress had patiently given the Grand Aerie at least four chances to comply with his orders, on November 7, 2001, Defendant still did not have a representative in attendance with full settlement authority because Mr. Monnich was unwilling to waive Ohio Casualty/Great American's lack of notice defense.

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Nor can the Grand Aerie disclaim responsibility for the conduct of its trial attorney John Cothorn. Plaintiffs' original Response pointed out the "tripartite relationship between insured, insurer and defense counsel." This Court is remined that when Judges [now Justices] Corrigan and Taylor were still at the Court of Appeals, they joined in a per curium opinion that found an attorney guilty of contempt for making false representations during a Court of Appeals argument. *In Re Thurston, 226 Mich. App. 205 (1997), rev. 459 Mich. 918 (1998).* That Court of Appeals panel remarked that "it will not tolerate [attorney] misconduct of any kind, without regard to the identity of the wrongdoers." *226 Mich. App. at 230.*

What MDTC characterizes as an "inadvertent and isolated mistake during discovery", even Judge O'Connell's dissenting opinion admitted led to a "negotiation fiasco." Plaintiffs did not contribute to the "fiasco," only the Grand Aerie, its attorney and its insurer representatives created the mess. As Judges Cooper and Fort Hood recognized, Judge Burress neither erred at law nor abused his discretion when he entered the liability default against the Grand Aerie for its attorney's, its insurer's, and its own, egregious conduct throughout the pretrial process. This Court should deny any relief on the Grand Aerie's Application.

II. THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY HELD THAT THE GRAND AERIE COULD NOT RE-LITIGATE LIABILITY AFTER THE ISSUE WAS SETTLED BY THE PROPERLY ENTERED DEFAULT.

As set forth in the Issue I analysis, the Grand Aerie had no reasonable excuse for its failure to comply with the requirements that created the default. The Grand Aerie's argument essentially complains about the size of the Judgment that was entered after its damages defense was heard and rejected by the jury. It is

inherently wrong to look upon the Judgment as nothing more than a discovery sanction. More accurately, the Verdict/Judgement is the total product of a series of incredibly poor litigation strategies and conscious bad choices by the Grand Aerie. Further, seven figure discovery sanctions are not unheard of in Michigan jurisprudence. See *Nartron v. GMC, 2005 Mich. App. LEXIS 22 (No. 245942 unpublished rel'd 1/6/05)* [Exhibit 43] (affirming $2.44 million award including MCR 2.313(B)(2) and other attorney fees and costs sanctions).

While it is true that there are Michigan cases where summary disposition has been granted after a default was set aside, Defendant has cited no analogous case where the default striking the Answer was held proper, but the defaulted party was still permitted to contest liability by way of an appellate challenge to a pre-default summary disposition denial. MCR 2.116(J)(2)(c) does not encompass this situation because once the liability default was entered by striking the Grand Aerie's Answer, the prior summary disposition motion and ruling became unreviewable. The Grand Aerie was no longer, "[a] party aggrieved by a decision of the court entered under this rule. . ." All issues relating to liability were subsumed by the default. Otherwise, as the Court of Appeals majority recognized, the default would be rendered meaningless. This Court should not condone the Grand Aerie's attempt to re-litigate liability by seeking reversal of the trial court's denial of its motion for summary disposition.

III. ASSUMING ARGUENDO THAT THE SUMMARY DISPOSITION DENIAL IS REVIEWABLE, JUDGE BURRESS CORRECTLY RECOGNIZED THAT THERE WERE "MATERIAL QUESTIONS OF FACT TO BE DECIDED BY THE TRIER OF FACT."

The trial court correctly found on the materials presented that the amount of

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control the Grand Aerie exercised over the local Aerie raised an issue of the fact. The Grand Aerie and its amicus ignore the deposition testimony, particularly that of Robert P. Wahls, the Grand Aerie's Secretary (Exhibit 10 to Response Brief). Wahls testified that there is only one Eagles organization which operates as a whole (Exhibit 10, p. 16, 70).

The Grand Aerie regularly reviews matters concerning the various local halls and when a local Aerie wants to do anything relative to its land or building, it must request approval from the Grand Aerie (Exhibit 10, p. 20; 49). Wahls also stated that the Grand Aerie has the clear right to control the Howell Aerie and to intervene if a public health threat exists on the premises (Exhibit 10, Wahls dep., p. 68). The Grand Aerie and the amicus also ignore the testimony of the Michigan Aerie Secretary Richard Downer and Howell Aerie Trustee Ivan Brooks who all supported Judge Burress' conclusion that the question of Grand Aerie liability could not be determined as a matter of law.

The applicable Restatement section is not 1 Restatement, Agency 2d §250 as the Elks/Moose amicus asserts, but §213 Principal Negligent or Reckless, which provides in part:

> "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> * * *
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

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Section 213 has been quoted with approval by this Court in *Haring v. Myrick, 368 Mich. 420 (1962)* and *Elliot v. AJ Smith Contracting Co., 358 Mich. 398 (1960)*. In Haring, the Court explained that the negligent entrustment of a motor vehicle has elements of both direct liability and vicarious liability. The analogous situation occurs here where the Grand Aerie ultimately controls the Howell Aerie by way of its supervisory power over its local agent and the premises and instrumentalities under the Grand Aerie's control.

The Elks/Moose amicus brief seizes upon dissenting Judge O'Connell's citation of *Kaminski v. Great Camp Knights of the Modern Maccabees, 146 Mich. 16, 18 (1906)*, but both the dissent and the amicus actually misstate the rationale of that decision. In his membership application, Kaminski agreed to be bound by a rule that stated that "the great camp will in no case be liable for any fault or negligence on the part of a subordinate tent or any of its officers in the transaction of any business whatsoever between the members or applicants for membership and the great camp." No analogous waiver by little Kegan or by his mother Lacey exists in this case.

Similarly, Judge O'Connell's dissent cited 18-348 Appleman on Insurance Law and Practice §10173 but quoted the exceptions, not the general rule:

> "The grand lodge of a fraternal organization cannot avoid responsibility for the acts of a subordinate lodge.
>
> * * *
>
> A regularly charted subordinate lodge in taking in and initiating candidates into its membership has been considered to be acting as an agent of the supreme lodge, so as to render the latter liable in damages to the candidate for injuries received by him during the course of such invitation, under the doctrine of respondeat superior."

The initiation cases that are annotated in support of the majority rule were all focused upon apparent agency. This is analogous to franchisor-franchisee apparent agency cases found in Plaintiffs' original response at pages 26-27. Had the Grand Aerie not completely thumbed its nose at the trial judge, the Plaintiffs, the rules of civil procedure and the jury, it would have had the opportunity to have the factfinder decide its liability whether direct, vicarious, actual or apparent. The Grand Aerie has only its own intransigence to blame for the fact that it did not receive that opportunity. This Court should not entertain the Grand Aerie's efforts to undermine the default, but if the Court does review the summary disposition denial, it is abundantly clear that Judge Burress' ruling was correct. The Court should deny the Grand Aerie any relief on its Application.

RELIEF REQUESTED

For the reasons set forth in Plaintiffs' original Response and this Supplemental Brief, the Court should deny the Application in its entirety.

Respectfully submitted,

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Dated: January 24, 2005

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